IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOWFIELD, INC., formerly GALAXY, INC., *Appellant*,

vs.

UNITED STATES OF AMERICA, et al., *Appellees*

No. 22609

WILLIAM H. AHMANSON, as President of HOWFIELD, INC., etc., *Appellants*

vs.

UNITED STATES OF AMERICA, et al., *Appellees*

No. 22602

APPELLANTS' REPLY BRIEF

Consolidated Appeals from the United States District Court for the Central District of California

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FIRST ACTION — CASE NO. 22609

In its brief, the Appellee ("government" herein) contends that, (1) since "51 sheets of paper" were unilaterally returned by the Special Agents to counsel of Appellants ("taxpayer" herein), this converted taxpayer's action to one merely seeking the suppression of evidence which is not maintainable prior to indictment, and (2) that the District Court's action dismissing the taxpayer's complaint was a dismissal without prejudice which is not appealable.

With respect to both contentions, the government relies primarily on the decision of this Court in *Hill vs. United States,* 346 F.2d 175. The taxpayer contends that this reliance is misplaced since the *Hill* case, *ON ITS FACE,* involved the taxpayer's *acquiescence* in the retention by the government of copies of his books and records. Every action taken by the government in the instant proceedings including the forcible return of the "51 sheets of paper" was done without any acquiescence on the part of taxpayer.

The government's position seems to be that it is free to violate the constitutional rights of a taxpayer in the conduct of an investigation, and then should the taxpayer complain of the government's improper conduct, the government can make and retain for subsequent use whatever notes or leads it thinks desirable, and then return to the taxpayer its books or records or copies thereof. Further, the government asserts that if it returns this material upon the taxpayer's demand, the taxpayer has no right to object to the improper methods used in the investigation until after indictment at which time the taxpayer may properly seek to suppress any illegally obtained evidence. The government's corollary position appears to be that only if it decides not to return the taxpayer's material, does the taxpayer have the right to maintain an action seeking the return and suppression of illegally obtained evidence prior to indictment.

Taxpayer submits that it is well established, although there is authority to the contrary, that American citizens have the right not to be indicted on the basis of illegally obtained evidence, and that standing exists to enjoin the use of such illegally obtained evidence prior to indictment. *Perlman vs. United States,* 247 U.S. 7 (1948); *Burdeau vs. McDowell,* 56 U.S. 465 (1921). The cavalier

manner by which government counsel ignores this right of taxpayers not to be improperly indicted, points out the need for this Court's restatement of this principle.

The *DiBella* case, *DiBella vs. United States,* 369 U.S. 121, 131 so often cited by the government for the proposition that these proceedings are not appealable, is a further demonstration of the implausibility of the government's position. *DiBella* merely holds that no appeal will lie if the attempted appeal is "but a step in the criminal case preliminary to the trial thereof." Neither *DiBella* nor *Hill* remotely support the government's contention that the dismissal of the taxpayer's complaint was within the discretion of the District Court.

In *Goodman vs. United States,* 369 F.2d 166, this Court specifically held that copies as well as the originals from which they were made must be returned if the originals were seized in violation of a taxpayer's constitutional rights. In reaching this decision, this Court clearly distinguished *Hill* on the same basis that the taxpayer urges in these proceedings, i.e., that in *Hill,* the taxpayer voluntarily turned over copies of his records to the government. In the instant case, while it may or may not be true that the government returned all copies of the taxpayer's books and records furnished by taxpayer's counsel, as well as copies thereof made by the government, it would be a nonsensical rule for the government to be permitted to make and retain notes of the contents of the material it returned. As this Court recognized in *Goodman* when it quoted from *Silverthorne Lumber vs. United States,* 251 U.S. 385, 392: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."

As this Court also pointed out in *Goodman,* this appeal lies since "common sense tells us that this is not merely another step in a criminal case for the simple reason that there is, and has been, no criminal case pending in any stage. Where no criminal action is pending at the time the moving party institutes a proceeding to suppress evidence, the proceeding is considered an independent suit in equity and the Court's order therein is appealable as a final decision. *United States vs. Rosenwasser,* 145 F.2d 1015, 156 ALR 1200 (9th Cir. 1944). In *Hill,* we noted that *DiBella vs. United States,* 369 U.S. 121, 82 S. Ct. 654, 7 L. ed 2d 614 (1962), had added the requirement that the movant or petitioner be seeking the return of property in addition to suppression. But as shown above, the appellants are entitled to have the copies turned over to them, as they requested, if the searches or seizures are found to have violated the Fourth Amendment.

"Therefore we conclude that the order of the Court below was final and that this Court had jurisdiction of the appeal under 28 U.S.C. ¶1291".

The taxpayer submits that common sense also dictates that if the taxpayer's constitutional rights were violated by the government in its acquisition of the taxpayer's books and records, the originals, copies thereof made by the taxpayer, copies thereof made by the government, as well as pencil notes or any other record made by government agents of this material is all equally tainted. In addition, it is well established that all leads obtained from tainted evidence, or fruit of the poisonous tree, is as inadmissible as the tainted evidence itself.

Nor is the government's position aided by the decision in *Maryland Penitentiary vs. Hayden,* 387 U.S. 294 since that case simply removed the limitation against "mere

evidence" being obtainable as a result of an authorized search. If anything, that case demonstrated that old fictions based upon common law property rights are no longer necessary as a basis for determining whether illegally seized evidence should be suppressed.

The District Court erred in dismissing taxpayer's complaint in 22609. The District Court had jurisdiction, and the taxpayer should have been permitted, as the moving party, to attempt to demonstrate and establish the method and manner by which its constitutional rights were violated. The taxpayer is not required to sit idly by and await an indictment before having the right to bring an action to have its illegally seized property returned as well as having the illegally seized evidence suppressed.

SECOND ACTION — CASE NO. 22602

The government's primary position with respect to the taxpayer's counterclaim and application for convening a Three-Judge District Court is that the District Court's dismissal of the counterclaim and denial of the application was correct since "appellants had an entirely adequate remedy at law by opposing or defending against the summons enforcement petition". (Gov't Brief p. 22.) The government concluded further that since the taxpayer has defended against the enforcement of the summons by presenting evidence in proceedings before a one judge District Court, and since a decision in this regard is pending, "resort to equity is unnecessary". (Gov't Brief p. 22.)

It is submitted that the government does not have the right to select or determine the relief which the taxpayer may seek. Furthermore, the government's suggestion that the taxpayer's attempt to obtain injunctive relief, in addition to being excused from complying with the

summonses served upon the taxpayer, was "too ambitious" is inappropriate. The taxpayer in its counterclaim set forth various requests for equitable relief, in addition to the prayer that the Court enjoin the government's intended use of a statute which the taxpayer contended was unconstitutional. The taxpayer is certainly entitled to make the assertion and then attempt to establish that its rights would not be adequately protected if it was only excused from complying with the summons. Neither the government nor the District Court should have the right to limit *in advance* the scope of the relief which the taxpayer in its best judgment felt it was entitled to seek. The taxpayer did not and does not have an adequate remedy at law merely by being relieved from complying with the summons served upon it, since the only way the taxpayer can insure that all forms of fruit of the poisonous tree may not be used against it is by the obtaining of the injunctive relief which it seeks. In addition, the taxpayer plainly has the right to assert the unconstitutionality of the statute. Under Section 2282 of Title 28 of the United States Code, only a Three-Judge District Court can make this determination.

The cases cited by the taxpayer in their opening brief make it clear that the District Court patently erred in dismissing taxpayer's counterclaim and application for Three-Judge District Court. This error could not be cured by the one Judge District Court deciding this case on the basis of evidence presented to him. Rather the only decision he was required to make was whether a substantial constitutional issue was presented. This Court, on August 19, 1968, reaffirmed the rule that only where the constitutional issue raised was "plainly unsubstantial" should an application for Three-Judge District Court be denied. *Gilmore vs. Lynch* .... F.2d .... (No. 22052,

9th Cir. 8/19/68). In reaching this decision, this Court quoted from *Ex Parte Poresky,* 290 U.S. 30, 32 (1933) as follows:

> " 'The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' " 290 U.S. at page 32.' "

In the instant proceedings, the District Court refused to make a determination whether the taxpayer's claim of unconstitutionality was "plainly unsubstantial." Rather than making this determination, which determination would be reviewable upon appeal by this Court, the District Court improperly concluded that the taxpayer did not have a right to seek equitable relief since an adequate remedy at law existed. The District Court stated that the adequate remedy at law consisted of the taxpayer's right to defend against the government's summons enforcement petition, and the right to appeal if the summonses were ordered enforced.

In *Schneider vs. Rusk,* 372 U.S. 224 (1963), the plaintiff sought to enjoin the enforcement of an Act of Congress which provided that a naturalized American citizen shall lose his citizenship by "having a continuous residence for three years" in the place of his birth. The only difference between *Schneider vs. Rusk* and the instant proceedings is that in that case the plaintiff was not defending an action brought by the government to divest him of his citizenship. There is no rational basis to hold that where a citizen is being threatened by governmental action, the propriety of which action is being challenged on constitutional grounds, that only the plaintiff — as dis-

tinguished from defendant — citizen has the right to a Three Judge District Court determination of the constitutionality of the statute. As enunciated so clearly in the cases cited herein as well as in the taxpayer's opening brief, the rule is otherwise. If the District Court determines that the constitutional issue was not "patently unsubstantial," the Court was without jurisdiction to do anything but notify the Chief Judge of this Circuit who should then have appointed a Circuit Judge and another District Judge who would then have constituted the Three-Judge District Court. Title 28 USC ¶2284.

The government contends that the taxpayer's attempt to invoke the equity jurisdiction of the Court is premature since there is no criminal case against the taxpayer presently in existence. The government further contends that the taxpayer's sole remedy is under Rule 41(e) of the Federal Rules of Criminal Procedure. The government thus maintains that the taxpayer cannot raise a constitutional question in defense of an action brought by the government seeking enforcement of these summonses. The government is seeking to have this Court hold that a taxpayer being investigated has absolutely no right of defense or relief available prior to indictment.

It is respectfully submitted that the state of the law has not developed to the point where a citizen cannot challenge the constitutional authority of the government in a matter directly affecting the life, liberty or property of that citizen in an action brought against him by the government.

The recent Supreme Court cases cited by the taxpayer make it abundantly clear that the trend towards expansion of taxpayers' rights has begun and that the time has come for this Court to state in unequivocally clear terms that taxpayers have constitutional rights which may not

be violated by the Internal Revenue Service, notwithstanding its important purpose of collecting revenue.

The District Court patently erred by dismissing taxpayer's counterclaim and application for convening Three-Judge District Court and by refusing to determine whether a substantial constitutional question had been raised. The subsequent proceedings and trial held by the District Court were a nullity and were without jurisdiction. This Court should determine that this matter be remanded with instructions to the District Court to notify the Chief Judge of this Circuit so that a Three-Judge District Court may be convened. This Three-Judge District Court would hear and determine not only whether Section 7602 of the Internal Revenue Code is unconstitutional, but all of the other issues presented by the pleadings.

Respectfully submitted,

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